

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

Cite as: [Unpublished]

Party Concepts, Inc., Debtor
Bankruptcy Case No. 01-34625-11

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

September 6, 2001

Christopher J. Stroebel, LaFollette Godfrey & Kahn, Madison, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The Debtor filed a motion for authority to provide adequate assurance to utility companies, since denied, to which Ramco-Gershenson ("Ramco") filed a limited objection. Ramco requested certain affirmative relief in its objection and will thus be treated as movant for purposes of this decision.

Ramco is the landlord of various shopping centers in which it leases space to the Debtor. Under its leases, Ramco supplies utility service to the Debtor. Ramco seeks to be treated as a utility under §366 of the Bankruptcy Code and receive adequate assurance of future payment for supplying utilities to the Debtor. If Ramco is not a utility under §366, it seeks permission to cease supplying utilities to the Debtor.

Sections 366(a) and (b) of the Bankruptcy Code provide:

[A] utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the

court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C §366(b). The Code unfortunately does not define “utility.” One early effort to fill this gap was In re Good Time Charlie’s, Ltd., a case involving a shopping mall landlord who provided electrical service to all the tenants in the mall including the debtor. 25 B.R. 226 (Bankr. E.D. Penn. 1982). Commencing his analysis with the language in §366, the bankruptcy judge found that “Congress [deliberately] chose to use the term ‘utility’ rather than ‘public utility’ in §366, thereby indicating to us that an entity other than a public utility could be considered a utility for purposes of §366”. Id. at 227. He then cited to §366’s accompanying legislative history:

This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility.

Id. citing House Report No. 95- 595, 95th Cong., 1st Sess. (1977) 350, U.S. Code Cong. & Admin. News 1978, pp. 5787, 6306. On this foundation the judge concluded that because “the debtor would be forced to incur a large and very possibly prohibitive expense in the form of rewiring, among other things, if it were required to seek electrical service from PP&L” the landlord qualified as a utility under §366. Id. Essentially, because the debtor “could not easily obtain comparable service” anywhere else the landlord had to be a utility. Several cases have followed this lead.

I am not convinced. Just because a landlord may take on one or more characteristics of a utility does not make it a utility or change its essential rights and duties from those described in its lease. To strain the old “duck analysis”, if a dog swims like a duck and stands on two legs like a duck – even if it emits a quack like a duck – it is still a dog and not a duck. A landlord with some characteristics of a utility is still a landlord not a utility.

Rather than muddying the language of §366 to create utilities where they have never been before, the Code provides protection for landlord supplied utility service in Section 365(b)(4), which provides:

. . . if there has been a default in an unexpired lease of the debtor, . . . the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

11 U.S.C. §365(b)(4). Lease clauses that require a lessor to supply utilities to a lessee add a simple service component to the overall lease contract. Under §365(b)(4) the lessor must

receive compensation for those services before the lease can be assumed.

The debtor in possession's need for continued utility service is met through the continued vitality of the lease pending its assumption or rejection. In this Circuit, a bankruptcy court can compel a nondebtor party to perform its contractual duties prior to the debtor's assumption of a contract. See In re Whitcomb & Keller Mortgage Co., 715 F.2d 375 (7th Cir. 1983) (holding "the bankruptcy court had the authority to preserve the status quo" under a services contract until the debtor made its decision to assume or reject). To compel that performance would not abrogate the requirement of §365(b)(4). If by its terms the lease conditions the landlord's obligation to provide utility service upon performance of some obligation by the tenant debtor, those lease terms may be enforced pursuant to 11 U.S.C. §365(d)(3), but Ramco cannot cloak itself as a utility to impose new terms of protection or security not found in the lease.

Because Ramco has not identified any terms of its lease which condition the landlord's duty to provide utility service, no basis for withholding that service has been shown. It is clear that the filing of this bankruptcy case cannot by itself support withholding utility service under the lease. See 11 U.S.C. §365(e). Having failed to demonstrate any cause for conditioning or withholding utility service to the debtor, the motions of Ramco are denied. It may be so ordered.